STATE OF MICHIGAN

COURT OF APPEALS

LARAWAY AND SONS,

Plaintiff/Counter-Defendant-Appellee,

v

B & B ENTERPRISES AND ENVIRONMENTAL, LLC,

Defendant/Counter-Plaintiff-Appellant,

and

WILLIAM BLANK,

Defendant-Appellant.

UNPUBLISHED
July 22, 2008

No. 270993
Kalamazoo Circuit Court
LC No. 03-000196-CH

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Defendants B & B Enterprises and Environmental, LLC (B & B Enterprises), and William Blank (Blank)[1] appeal as of right from the May 30, 2006, order of the trial court entering judgment for plaintiff. We affirm.

I. Basic Facts

B & B Enterprises obtained a bid from the City of Portage to acquire and move three houses from condemned property. B & B Enterprises sought to purchase land in Pavilion Township, Michigan, from Esther Randles, where it would eventually move its three houses. Plaintiff is in the business of moving buildings and structures, and it entered into a contract with Blank on July 20, 2001, "to furnish the necessary labor, equipment and engineering to load,

[1] Blank is the president and operating manager of B & B Enterprises. In many cases, B & B Enterprises and Blank filed joint pleadings.

move and [support defendants' three houses]." The agreement called for Blank to pay plaintiff $70,000 with 10 percent due at the signing of the contract. Blank was to pay plaintiff $28,000 before the project began, on or before July 23, 2001. The balance was due from Blank to plaintiff when "the houses are moved to their new location." Plaintiff received the down payment of $7,000. Blank failed to make the first installment payment of $28,000 to plaintiff by July 23, 2001, and the move was delayed; however, plaintiff subsequently accepted a late payment for the first installment on October 3, 2001.

The move was further delayed when Blank did not close on Randles' property until October 12, 2001. On November 6, 2001, plaintiff moved the houses from Portage to Pavilion Township. Moving the three houses proved to be an arduous task, compounded by Blank's failure to perform certain preparatory tasks per the contract, including disconnecting utility lines and trimming tree limbs along the move route.

When the houses were finally delivered to Pavilion Township, Blank was not sure where he wanted the houses placed on the land. They were therefore placed together on the land. At trial, Blank claimed that the excavation was complete for one of the houses one or two days before the houses were delivered. However, Blank later admitted that the foundation and supports for that house were not even ready until the following February, and plaintiff lowered that house onto its foundation and supports on February 7, 2002. Initially, plaintiff did not press any claim against defendants for outstanding sums. Rather, plaintiff demonstrated a willingness to cooperate with defendants. Tom Laraway explained that plaintiff moved the one house to its foundation several months later, because Blank "promised that he was going to get us the money as soon as the house was let down on the foundation, he was going to mortgage it and get us the rest of the money."

On July 24, 2002, having not been paid the remainder under the contract, plaintiff filed a claim of lien, and thereafter filed a complaint for foreclosure of construction lien. On August 5, 2005, defendants moved for summary disposition. The trial court did not rule on defendants' motion for summary disposition, continuing the hearing to a date to be selected by the parties. The bench trial commenced on January 10, 2006, without reference to defendants' motion for summary disposition. The trial court entered judgment in favor of plaintiff, awarding the entire final installment. The trial court held B & B Enterprises jointly liable with Blank for the damages.

II. Breach of Contract

Defendants argue that plaintiff breached the contract when it failed to deliver the houses to their final destinations, but placed them altogether on the land.

Issues of contract interpretation present questions of law subject to de novo review. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006). Moreover, findings of fact by a trial court following a bench trial are reviewed for clear error. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). A finding of fact is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

The primary goal in the construction or interpretation of any contract is to honor the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998) (citations omitted). If there is no ambiguity or internal inconsistency, then contractual interpretation begins and ends with the actual words of a written agreement. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). If a contract is susceptible to but one reasonable interpretation, however awkwardly worded or arranged, then it is not ambiguous. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). The language of a contract should be given its plain and ordinary meaning. *Id.* A contract provision that is capable of two or more reasonable constructions is ambiguous. *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984).

The contract outlined certain other duties for each party, and also provided:

> [Blank] will provide the new foundations and supports completed under said homes within a six (6) week time period from the date the houses are moved and set by [plaintiff]. An additional charge of thirty dollars ($30.00) per day will be added thereafter if [plaintiff's] blocking and equipment are not able to be removed from under [Blank's] houses as a result of [Blank's] failure to have the new foundation constructed and ready for the houses to be set back on by [plaintiff] within the time period heretofore set forth in this paragraph. It will be the responsibility of [Blank] to contact [plaintiff] when foundations are complete and project is to be completed by [plaintiff].
>
> [Plaintiff shall then after the completion of new foundations and supports provided for by [Blank], lower the homes onto the new foundations and supports.

Under the contract, Blank would pay plaintiff $70,000:

> Seven thousand dollars ($7,000.00) [or] ten percent (10 percent) of the total project at the signing of this contractual agreement and is to be considered the deposit for the project.
>
> Twenty-eight thousand dollars ($28,000.00) before the project begins (This amount due on or before July 23, 2001) and
>
> The remaining thirty-five thousand dollars ($35,000.00) when the houses are moved to their new location.

Further, that:

> Any additions under the terms of this contractual agreement are to be done under written orders and/or an addendum made to the original contractual agreement and any additional amounts of compensation for any additional work performed by [plaintiff] shall be payable by [Blank] when work is completed.

The contract requires defendant to make the final $35,000 payment "when the houses are moved to their new location." Defendant argues that "the houses are moved to their new location" when they are set upon the foundation, not just moved to the site. However, the

contract elsewhere refers to the act of placing the houses on foundations in particularity, for instance, to "lower the homes onto the new foundation and supports," and "to be set back on," and even the "to complete" the contract. Had the parties intended that final payment be made after plaintiff situated the houses on the new foundations, the contract would have referred to one of the above phrases used to describe that event. Instead the contract simply conditions payment upon "when the houses are moved to their new location." The plain language of the contract did not premise payment on the ultimate setting of the houses on foundations. We agree with the trial court in that by failing to pay the final installment, defendants breached the contract.

III. Damages

Next on appeal, defendants argue that the proper measure of damages for its breach was not the entire second installment of $35,000. We review a trial court's determination of damages following a bench trial for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003).

The trial court's conclusion that plaintiff fully performed, and that it was entitled to the entire final installment payment was not clearly erroneous. In the instant action, the trial court rejected defendants' theory that the final installment should be offset by defendants' labor and expenses incurred in assisting during the move; the trial court concluded that the parties did not modify the contract. The trial court ruled:

> While Blank may have assisted either personally or through others in the move, his motivation to do so was not for reasons of contract modification. It is clear that the move was made under conditions less favorable than not, given the time of year, the inclement weather and the coming of winter. Further, Blank was motivated to have the structures moved quickly because he was under a deadline to move them in his purchase agreement with Portage, or risk demolition. Additionally, Blank already had his own moving equipment on site to move other structures not covered by the contract and could easily satisfy his more pressing needs by rendering nominal on-site assistance.
>
> Given the passage of time, memories often dim and perception brighten. Curiously, not once did Blank demand a renegotiation of the contract or seek a discount until forced to use it as a defense when he was sued for the last installment of $35,000. Under these circumstances, silence speaks louder than words. If Blank supplied assistance, it was voluntary, nominal and gratuitous in the overall scheme of things.

"[C]ontracting parties are at liberty to design their own guidelines for modification or waiver of the rights and duties established by the contract." *Quality Products, supra* at 372. In this case, contrary to defendant's claims, there was testimony that plaintiff's equipment was adequate to move the three houses. Defendants may have moved other structures, i.e., garages or sheds, but under the contract, plaintiff agreed to move only the three houses. Further, defendants were required to perform various tasks in preparation of the move. There was testimony that many of these tasks were not performed until the day of the move, i.e., tree trimming, disconnecting utilities. As such, the move was delayed and it was not completed until the early morning hours of November 7, 2001. Significantly, there was no testimony that Blank sought to

renegotiate the contract or that Blank expected payment from plaintiff for his assistance on move day. Further, there was no evidence that the parties agreed to alter any other terms in the contract. See *Independence Twp v Reliance Bldg Co*, 175 Mich App 48, 53; 437 NW2d 22 (1989) ("[n]o contract can arise except on the express mutual assent of the parties"). We conclude that defendants failed to establish that there was a waiver or modification of the contract that entitled him to offset the amount due as final payment. *Quality Products, supra* at 372. Thus, the trial court's award of damages was not clearly erroneous. *Alan Custom Homes, supra* at 513.

IV. Joint Liability

Next, defendants argue on appeal that the trial court erred in holding B & B Enterprises jointly liable with Blank. Defendants argue that, because the corporate veil had been pierced and B & B Enterprises found not to exist for purposes of this case, joint liability was impossible. Defendants failed to cite authority to support this novel position, and we deem it to be abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (an appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue on appeal).

V. Validity of the Construction Lien

Defendants next assert that the trial court erred in denying B & B Enterprises' motion for summary disposition regarding the invalidity of the construction lien.

We review de novo a trial court's denial of summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *ER Zeiler Excavating, Inc v Valenti, Trobec & Chandler, Inc*, 270 Mich App 639, 643; 717 NW2d 370 (2006). This Court reviews de novo jurisdictional questions under MCR 2.116(C)(4) to "determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate . . . [a lack of] subject matter jurisdiction." *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 356; 733 NW2d 107 (2007) (citation omitted). A ruling made under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007). "The motion should be granted only if no factual development could possibly justify recovery." *Id.* Disposition of this question also calls for this Court to interpret provisions of the Construction Lien Act, MCL 570.1101 *et seq*. This Court reviews de novo questions of statutory interpretation. *ER Zeiler Excavating, supra* at 643.

The purpose of the Construction Lien Act, is "to protect the interests of contractors, workers, and suppliers through construction liens, while protecting owners from excessive costs." *Vugterveen Sys, Inc v Olde Millpond Corp*, 454 Mich 119, 121; 560 NW2d 43 (1997). The Act should be "liberally construed to effectuate these purposes." *Id.*

MCL 570.1107(1) provides:

> Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property, as

> described in the notice of commencement given under section 108 or 108a, the interest of an owner who has subordinated his or her interest to the mortgage for the improvement of the real property, and the interest of an owner who has required the improvement. A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract.

We conclude that plaintiff is a "contractor" under the plain meaning of MCL 570.1103(5), which defines "contractor" as "a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property."

Having determined plaintiff is a contractor under the Act, we must next determine whether it made "an improvement to real property" pursuant to the Act. MCL 570.1104(7) provides:

> "Improvement" means the result of labor or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting, constructing, altering, repairing, ornamenting, landscaping, paving, leasing equipment, or installing or affixing a fixture or material, pursuant to a contract.

Additionally, MCL 570.1103(1) provides:

> "Actual physical improvement" means the actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement. Actual physical improvement does not include that labor which is provided in preparation for that change or alteration, such as surveying, soil boring and testing, architectural or engineering planning, or the preparation of other plans or drawings of any kind or nature. Actual physical improvement does not include supplies delivered to or stored at the real property.

Under the terms of the contract, plaintiff agreed "to furnish the necessary labor, equipment and engineering to load, move and support [Blank's] three (3) house[s]." Specifically, plaintiff agreed to move three houses from one location to another location, and then, after Blank completed the houses' new foundation, plaintiff agreed to lower the houses onto the new foundations. We conclude plaintiff provided labor and/or materials to install or affix a fixture or material, MCL 570.1104(7), because the three houses can be classified as fixtures, and plaintiff contracted to install these fixtures to their foundations.

Our Supreme Court applied a three-part test to determine whether gas ranges were fixtures for the purposes of a lien: (1) "annexation to the realty, either actual or constructive;" (2) "adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated;" and (3) "intention to make the article a permanent accession to the freehold." *Peninsular Stove Co v Young*, 247 Mich 580, 582; 226 NW 225 (1929); see also *Wayne Co v Britton Trust*, 454 Mich 608, 610; 563 NW2d 674 (1997). "The focus is on the

intention of the annexor as manifested by the objective, visible facts, rather than the annexor's subjective intent." *Ottaco, Inc v Gauze*, 226 Mich App 646, 651; 574 NW2d 393 (1997). "Intent may be inferred from the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation." *Wayne Co, supra* at 619. Here, it is very clear that there was an intention to permanently affix the houses to the property. In considering the purpose of a house or dwelling, our Supreme Court held that even a movable house or dwelling becomes part of the real property because it is a permanent improvement. *Rzeppa v Seymour*, 230 Mich 439, 443; 203 NW 62 (1925).

In sum, we conclude that plaintiff was a contractor, which provided an improvement to real property, i.e., installing or affixing a fixture or material, and plaintiff has a construction lien upon the interest of the owner or lessee who contracted for the improvement to the real property. See MCL 570.1107(1).

VI. Commencement of Claim of Lien

Next, this Court must consider whether plaintiff commenced its claim of lien as provided for by MCL 570.1111. "To recover under the Construction Lien Act, a claimant must record the lien within ninety days of the last date of furnishing material or labor," and that "[t]he ninety-day deadline means precisely ninety days." *Central Ceiling & Partition, Inc v Dep't of Commerce*, 249 Mich App 438, 442, 445; 642 NW2d 397 (2002). In the instant case, there was testimony that plaintiff performed routine inspections at the new location to ensure that the pilings supporting the houses would not deteriorate after the move. Richard Laraway testified that he performed such an inspection on June 28, 2002, and during the course of that inspection, he repaired a portion of the cribbing. We conclude that such a repair constituted an "improvement" under MCL 570.1104(7). Thus, plaintiff filed timely its construction lien pursuant to MCL 570.1111(1), filing the lien "within 90 days after the lien claimant's last furnishing of labor or material for the improvement." Because plaintiff was entitled to a construction lien pursuant to MCL 570.1107, and plaintiff filed timely the construction lien pursuant to MCL 570.1111, we conclude that defendants were not entitled to summary disposition. Summary disposition was not proper pursuant to MCR 2.116(C)(4), because the trial court had subject matter jurisdiction over the construction lien. MCL 570.1118(1). Further, summary disposition was not proper pursuant to MCR 2.116(C)(8), because plaintiff stated a claim on which relief could be granted.

VII. Extortion and Slander of Title

Finally on appeal, defendant contends that the trial court erred in dismissing B & B Enterprises' counterclaims alleging extortion and slander of title. We disagree. First, defendants provide only cursory treatment to the extortion claim without citation to authority. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims; nor may he give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue on appeal. *Yee, supra* at 406.

Second, the record undermines defendants' slander of title counterclaim. "To establish slander of title at common law, a [party] must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in

property, causing special damages." *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). Defendants' argument rests on the false assumption that plaintiff's construction lien is invalid. As discussed previously, we concluded that plaintiff's construction lien was valid and timely filed. Additionally, this Court has held that MCL 570.1107(3) "preserves existing construction liens when the entity that contracted for the subject improvement loses the relevant interest in the improved property." *Stocker v Tri-Mount/Bay Harbor Bldg Co, Inc*, 268 Mich App 194, 200; 706 NW2d 878 (2005). Thus, B & B Enterprises' slander of title counterclaim also lacked merit.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher